

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE

TIMOTHY S. WILLBANKS,

Appellant,

v.

MISSOURI DEPARTMENT OF CORRECTIONS,

Respondent.

DOCKET NUMBER WD77913

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: October 27, 2015

APPEAL FROM

The Circuit Court of Cole County, Missouri
The Honorable Daniel R. Green, Judge

JUDGES

Division Three: Mitchell, P.J., and Hardwick and Gabbert, JJ.

CONCURRING.

ATTORNEYS

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Attorney for Appellant,

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MISSOURI APPELLATE COURT OPINION SUMMARY MISSOURI COURT OF APPEALS, WESTERN DISTRICT

TIMOTHY S. WILLBANKS,

Appellant,

v.

MISSOURI DEPARTMENT OF
CORRECTIONS,

Respondent.

OPINION FILED:
October 27, 2015

WD77913

Cole County

Before Division Three Judges:

Karen King Mitchell, Presiding Judge, and Lisa White
Hardwick and Anthony Rex Gabbert, Judges

Timothy Willbanks appeals the grant of the Department of Corrections (DOC) motion for judgment on the pleadings in his declaratory judgment action. Willbanks sought a declaration that Missouri statutes and regulations imposing mandatory minimum prison terms before parole eligibility are unconstitutional, as applied to juveniles, under the United States Supreme Court's holding in *Graham v. Florida*, 560 U.S. 48 (2010), when the statutes and regulations operate to deny a juvenile a parole eligibility date during his natural life expectancy. Because *Graham* is inapplicable to Willbanks's multiple, consecutive, term-of-years sentences, the trial court committed no error in granting DOC's motion for judgment on the pleadings.

APPEAL DISMISSED; PETITION FOR WRIT OF HABEAS CORPUS DENIED.

Division Three holds:

1. Conditional challenges to the constitutionality of a statute do not invoke the Missouri Supreme Court's exclusive jurisdiction.
2. Though Willbanks brought his claim in a declaratory judgment action, it should have been brought in a petition for writ of habeas corpus because he has alleged that *his particular sentence* is unconstitutional and, therefore, invalid.

3. In limited circumstances, the appellate court will treat improper appeals as applications for original writs, if a writ is available to a movant.
4. Here, the parties have provided sufficient record and briefing on issues pertaining to the propriety of considering a habeas corpus writ petition, and a dismissal would simply create unnecessary delay and duplication of effort. Thus, we will treat this appeal as an original petition for a writ of habeas corpus.
5. Though Willbanks failed to raise this claim either on direct appeal or through post-conviction relief under Rule 29.15, his procedural default is excused under the sentencing-defect theory.
6. Although Willbanks's sentences comply with Missouri statutes, he claims that they are in violation of the Eighth Amendment, as interpreted by *Graham*. This argument falls within the sentencing-defect exception and permits us to review the merits of his claim.
7. To show he is entitled to relief, Willbanks must prove: (1) that he was a juvenile at the time he committed the crimes; (2) that he was convicted of solely nonhomicide offenses; and (3) that he received a sentence of life without the possibility of parole.
8. While there is no question that Willbanks was a juvenile at the time of his offenses, it is unclear whether first-degree assault, where charged as including an attempt to kill, constitutes a nonhomicide offense as contemplated in *Graham*.
9. Regardless of how first-degree assault is categorized, Willbanks failed to demonstrate that he received a sentence of life without the possibility of parole because his seven, consecutive, term-of-years sentences are not the same as a single LWOP sentence.
10. Willbanks's proposed categorical approach is unworkable for a variety of reasons, ranging from the inherent difficulty of defining a de facto LWOP sentence to the implicit conflict it creates with the dictates of *Miller* and the Eighth Amendment's bar on the arbitrary imposition of severe penalties.
11. The *Graham* holding was limited to the imposition of a life without parole sentence for a single nonhomicide offense; it simply does not apply to multiple, consecutive, parole-eligible, term-of-years sentences. Accordingly, Willbanks's petition for a writ of habeas corpus is denied.

Opinion by: Karen King Mitchell, Presiding Judge

October 27, 2015

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THIS SUMMARY IS **UNOFFICIAL** AND SHOULD NOT BE QUOTED OR CITED.